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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ROBERT T. STOMBAUGH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

Is a court-martial proceeding which has been found to be infected by unlawful command influence structurally defective so that a military appellate court should presume prejudice, and not apply the constitutional harmless error test?

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals[1], *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review[2], *United States v. Stombaugh*, 36 M.J. 1180 (N.M.C.M.R. 1993), is reprinted as Appendix B.

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[1] The United States Court of Military Appeals has been renamed the United States Court of Appeals for the Armed Forces. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

[2] The United States Navy-Marine Corps Court of Military Review has been renamed the United States Navy-Marine Corps Court of Criminal Appeals. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 15, 1994. Title 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 37(a), U.C.M.J., 10 U.S.C. § 837(a) provides:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof.

STATEMENT OF THE CASE

Petitioner was charged with the rape of a female junior grade officer, the indecent assault of a dependant wife, burglary and unlawful entry in violation of Articles 120, 134, and 129, Uniform Code of Military Justice, Manual for Courts-Martial, 1984 [hereinafter U.C.M.J.], 10 U.S.C. §§ 920, 934, and 929.

Contrary to his pleas petitioner was found guilty of all charges, and was sentenced to 93 months confinement, partial forfeitures of pay, reduction to the lowest enlisted pay grade, and a dishonorable discharge from the United States Navy. The convening authority suspended all confinement and forfeitures in excess of 72 months.

Before both the Navy-Marine Corps Court of Military

Review and the United States Court of Military Appeals, petitioner raised the issue of whether the fact that two of his witnesses had been intimidated and harassed by other service members constituted a violation of Article 37(a), U.C.M.J., 10 U.S.C. § 837(a) -- Unlawfully influencing action of court.

The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. *United States v. Stombaugh*, 36 M.J. 1180 (N.M.C.M.R. 1993). The court analyzed petitioner's claim of error and agreed that the actions taken against two defense witnesses, Petty Officer Trickel and Lieutenant Gonzalez, constituted unlawful command influence in violation of Article 37(a), and found that "numerous command subordinates, even a Division Officer within the chain of command, participated in the intimidation and the harassment of both Lieutenant Gonzalez and Petty Officer Trickel." *Stombaugh*, 36 M.J. at 1186. The court then reviewed the record, and found that it was convinced beyond a reasonable doubt that the unlawful command influence did not affect either Petty Officer Trickle's or Lieutenant Gonzalez's testimony, or the findings in petitioner's case. *Id.* at 1187.

On appeal, pursuant to Article 67, U.C.M.J., 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed petitioner's conviction and sentence. *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994). The Court of Military Appeals agreed that both witnesses had been intimidated and harassed in violation of Article 37(a), but similarly found beyond a reasonable doubt that the unlawful command influence did not affect the findings or sentence in petitioner's case. *Stombaugh*, 40 M.J. at 213-

214.[3]

REASON FOR GRANTING THE PETITION

This Court promulgated the constitutional harmless error test in *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman* the Court indicated that most constitutional errors can be tested for prejudice within the context of the entire trial. However, *Chapman* indicated that there were certain constitutional errors which would not be subject to harmless error analysis. Such errors included the total deprivation of the right to counsel at trial; *Gideon v. Wainwright*, 372 U.S. 335 (1963), trial before a partial fact-finder; *Tumey v. Ohio*, 273 U.S. 510 (1927), and the use of a coerced confession at trial; *Payne v. Arkansas*, 356 U.S. 560 (1958).

In *Arizona v. Fulimante*, 499 U.S. 279 (1991)(opinion of Rehnquist, C.J., for the Court) the Court divided constitutional errors into two types for purposes of determining which errors would be subject to the *Chapman* harmless error analysis. Constitutional errors were divided

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[3] The Court of Military Appeals found unlawful command influence with respect to one of the two witnesses involved. *Stombaugh*, 40 M.J. 210-12. With respect to the other witness, the court found unlawful interference with petitioner's access to witnesses, and then reviewed this error in the same manner as it did the unlawful command influence. *Id.* at 212-213. Petitioner believes that, as a matter of law, the interference with both witnesses amounted to unlawful command influence. *See id.* at 215 (Sullivan, C.J., concurring in the result); *Stombaugh*, 36 M.J. at 1185-86. Regardless, however, both courts below agreed that petitioner's trial was infected with unlawful command influence to some extent.

into "trial errors" and "structural defects".[4] *Id.* at 309-310. The Court held that "structural defects" are defects in the trial mechanism, and that such defects defy analysis by "harmless error" standards. *Id.* The Court then listed other defects which it defined as "structural defects": unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). The Court stated that "[e]ach of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulimante*, 499 U.S. at 310.

The Court of Military Appeals has held that "[c]ommand influence is the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986), *cert denied*, 479 U.S. 1085 (1987). The court in *Thomas* stated that "[t]he exercise of command influence tends to deprive servicemembers of their constitutional rights." *Id.* The court then went on to state that

> as was perfectly clear to Congress when it enacted the Uniform Code of Military Justice and the Military Justice Act of 1968 -- and as the judges of this Court have always understood -- **command influence "involves 'a corruption of the truth-seeking function of the trial process'"**.

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[4] This Court reversed *Payne v. Arkansas* with its decision in *Arizona v. Fulimante* by redefining the use of a coerced confession as a "trial error" which could be analyzed under the harmless error analysis.

Id. at 393-394 (emphasis added).

In *Thomas* the Court of Military Appeals held that once unlawful command influence has been identified, a military appellate courts must apply the *Chapman* constitutional harmless error analysis to the facts of the particular case, before that court can affirm the findings or sentence. *Id.* at 394. Since this Court decided *Fulimante*, however, the Court of Military Appeals has not considered whether unlawful command influence was a trial defect, or a structural defect. In petitioner's case, the court treated it as a trial defect, and applied a harmless error analysis. *Stombaugh*, 40 M.J. at 214. Petitioner believes that unlawful command influence is a structural defect, and so should not be subject to the *Chapman* analysis.

The view of Congress and the Court of Military Appeals regarding the corrupting effect of unlawful command influence is due, in large part, to the fact that a convening authority plays a pervasive role in the military criminal justice system which is far beyond the role played by any single person or office in any civilian criminal justice system. The convening authority decides which offenses will be criminally prosecuted, Rule for Courts-Martial 601, Manual For Courts-Martial, 1984 [hereinafter R.C.M.]; appoints the investigator responsible for determining probable cause to prosecute, R.C.M. 405; creates the court-martial which tries the defendant, R.C.M. 504; appoints the persons who act as finders of fact during the court-martial, R.C.M. 503; controls part of the pretrial discovery process, R.C.M. 702(b); controls the availability of expert assistance before and during trial, R.C.M. 703(d); grants or denies immunity to potential witnesses, R.C.M. 704; and has absolute discretion post-trial when acting on the results of a court-martial, R.C.M. 1107, Article 60, U.C.M.J.; 10 U.S.C. § 860; *Weiss v. United States*, 114 S.Ct 752, 759 (1994).

In addition to his authorized control over the court-martial process, a convening authority will almost always also be in a position to effect a court-martial through his inherent powers as a commanding officer. Most likely the convening authority will be the commanding officer of the defendant and the defendant's chain of command. *See Discussion*, R.C.M. 601; *Thomas*, 22 M.J. at 391-92. A convening authority is also likely to be the commanding officer of many of the potential witnesses. *See Thomas*, 22 M.J. at 391-92. Finally, the convening authority is almost sure to be the commanding officer of the finders of fact he has appointed to the court. R.C.M. 503.

The military appellate courts have also recognized that the actions of persons subordinate to the convening authority can constitute unlawful command influence. *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991); *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987). Such subordinates will usually be persons senior to the defendant, witness, or member of the court-martial influenced, and in his or her chain of command, but junior to the convening authority. *Stombaugh*, 40 M.J. at 211. The courts have viewed such subordinates as being guilty of unlawful command influence because they are acting with the "mantle of command authority", and thus the power and position of a convening authority is implicated in their actions. *Id.*

In understanding the nature of unlawful command influence with respect to the court-martial process, it is instructive to consider a case in which this Court recently had the occasion to examine the reliability of another aspect of the military criminal justice system. In *Weiss* the Court examined the independence of the military judiciary. The Court found that the military judiciary was reliable and independent because military judges had been insulated from the possibility of being pressured by persons who

might have a vested interest. *Weiss*, 114 S.Ct at 762. Most of the other participants in the court-martial process, however, other than the military judge, are subject to being pressured by persons with an interest in the outcome of the proceedings.

A convening authority, due to his pervasive role in the court-martial process, and his inherent authority as a commanding officer, is in a position effect the performance and actions of the other participants in a court-martial. Further, that convening authority may well have an interest in the outcome of the court-martial. Thus, the institutional barriers between the judiciary and those with interest in the outcome of a case, which this Court viewed in *Weiss* as guaranteeing the reliability and independence of the military judiciary, are absent with respect to all other participants of a court-martial. The absence of such barriers expose those other participants to interference, and endangers a military defendant's right to a fair trial and due process.

In the military community, with its attendant rank structure and potential for abuse based upon wrongful use of that rank structure, it is impossible to determine with any degree of reliability in what manner unlawful command influence has effected a trial. Due to the role which a convening authority plays in a court-martial, and the awesome powers which a convening authority and his subordinates are likely to have over most or all of the participants in a court-martial, the existence of unlawful command influence threatens the underpinnings of a fair trial in insidious ways which are not easily discovered or analyzed.

Once the existence of such a pernicious corrupter of the process is found to exist in some form, it is no longer sufficient to be satisfied with a lack of evidence of its existence in other forms within the process. In petitioner's

case, after both the Court of Military Appeals and the Navy-Marine Corps Court of Military Review found that witnesses had been harassed and intimidated, both courts applied the *Chapman* harmless error analysis and held that "[a]ppellant had failed to demonstrate what legally and logically relevant evidence was not admitted because of the allegations of interference with these two witnesses." *Stombaugh*, 40 M.J. at 214; 36 M.J. at 1187. Both courts then proceeded to hold that the existence of unlawful command influence did not affect the findings or sentence in petitioner's case. *Id.*; *Stombaugh*, 36 M.J. at 1186-87. Rather than being evidence that it did not exist, the fact that petitioner could not present evidence of other forms of unlawful command influence might well be testament to the pervasive, insidious nature of unlawful command influence in the military, and the probable specific effect on the military community involved in petitioner's case.

As stated by the Court of Military Appeals, "command influence is the mortal enemy of military justice", and it causes "a corruption of the truth-seeking function of the trial process". *Thomas*, 22 M.J. at 393. Unlawful command influence can effect the framework within which a court-martial operates, and as such is a structural defect rather than a trial error. Such a defect, once it is found in any form, should not be subjected to harmless error analysis. Once a military appellate court identifies the existence of unlawful command influence, in any form, the case should be remanded for a new trial.

CONCLUSION

Petitioner's case presents a fundamental question of Constitutional law, and calls into doubt the fairness of the process by which petitioner was convicted and sentenced. Unlawful command influence has an indeterminate but

potentially catastrophic effect on a court-martial. Given the nature of unlawful command influence, there is no reliable method for testing its effect on a court-martial. Once a military appellate court finds that a court-martial was infected by unlawful command influence, that court should remand the case for a new trial with a different convening authority. Accordingly, this Court should address whether unlawful command influence should be considered a "structural defect" in the court-martial process, and thus not subject to the *Chapman* harmless error analysis.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0810

CMR No. 92 0181

UNITED STATES, Appellee,

v.

Robert T. STOMBAUGH, Aviation Machinist's Mate Airman Apprentice, U.S. Navy, Appellant.

Argued April 19, 1994

Decided Sept. 15, 1994

Accused was convicted by general court-martial, Peter J. McLaughlin, J., of rape, indecent assault, burglary, and unlawful entry. The United States Navy-Marine Corps Court of Military Review, Strickland, Senior Judge, affirmed, 36 M.J. 1180. Review was granted. The United States Court of Military Appeals, Crawford, J., held that any unlawful command influence on either of two witnesses for accused did not affect findings or sentence to support finding of prejudice.

Affirmed.

Wiss, J., filed opinion concurring in part and in result.

Sullivan, C.J. filed opinion concurring in result.

For Appellant: *Chuck R. Pardue* (argued); *Lieutenant James A. Douglas*, JAGC, USNR (on brief).

For Appellee: *Lieutenant D.K. Herlihy*, JAGC, USNR (argued); *Colonel T.G. Hess*, USMC, *Commander S.A. Stallings*, JAGC, USN, *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN,*Major Laura L. Scudder*, USMC (on brief).

Opinion of the Court

CRAWFORD, Judge:

Contrary to his pleas, appellant was convicted of rape of C, a female junior grade officer; indecent assault on W, a dependent wife; and burglary and unlawful entry of C's room at the bachelor officers quarters (BOQ), all on September 2, 1990, in violation of Articles 120, 134, and 129, Uniform Code of Military Justice, 10 USC §§ 920, 934, and 929, respectively. Appellant was sentenced to a dishonorable discharge, 93 months' confinement, partial forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence but suspended all confinement and forfeitures in excess of 72 months. The Court of Military Review affirmed the findings and sentence. 36 MJ 1180 (1993). We granted review of the following issue:

> WHETHER APPELLANT'S COURT-MARTIAL WAS UNFAIR AND PREJUDICIAL DUE TO COMMAND

INFLUENCE.

We hold that appellant's trial was not unfairly prejudiced by unlawful command influence.

FACTS

The following facts were set forth by the Court of Military Review.

W was awakened by the closing of the front door and a male who lay down beside her with his face on her breasts. In response to W's inquiry as to who he was, the male replied that he was a new pilot in C's squadron and that C told him he could "crash" there. After a short discussion, during which W became initially convinced that the male was a pilot, W felt the male's hand moving toward her groin area and she got up, got dressed, and left the room. Thereafter, the male left the room and later returned and entered the bedroom where C slept. C testified that she was awakened by a male on top of her with his penis penetrating her vagina. She recognized this male as the appellant, an enlisted man in her squadron. C stated that she pushed the appellant away and told him to leave. The appellant complied. The appellant asserted at trial and again on appeal that C had consented to the intercourse or, in the alternative, that he was honestly and reasonably mistaken in believing that she had consented. He testified that some 6 months previously, C had invited him to come to her room sometime and "party" and, having been locked out of his room at 0400, he decided to take her up on the invitation. He denied representing himself to W as an officer, placing his face on her breasts, or reaching for her groin area. The appellant further testified that when he entered C's bedroom she was lying naked on the bed and

that she touched his wrist and then his shirt and belt. After removing his clothes and getting in bed with C, the appellant said that she assisted him in inserting his penis and reinserted his penis into her vagina when it slipped out. He further stated that she wrapped her legs around him and moved her body back and forth. However, the appellant testified that at some point he decided he did not want to do this and stopped, at which time C commented that this could ruin her career and he had better leave before they were seen together.

In support of this defense, numerous [more than 10] character witnesses were called to testify as to the appellant's character for peacefulness and for being truthful, while C was portrayed [by 5 witnesses] as having a reputation for drinking to intoxication and for being promiscuous. One of the character witnesses, Lieutenant Gonzalez, testified that he was told by fellow junior officers in the squadron that he should not testify for the appellant and against the victim. Another character witness, a petty officer, asserts in an affidavit that his division officer told him not to get involved and that he was verbally harassed by two other officers when they learned he was going to testify for the appellant.

36 MJ at 1182-83.

Without a prosecution objection, appellant testified[1] that

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[1] The record of trial in this case as submitted to the Court consists of VIII volumes. However, for example, Volume IV consists of trial pages 1001-1325, while Volume VIII consists of trial pages 900-1359. The action is in Volume IV. The exhibits are in Volumes IV and V. There was no mistrial or rehearing involved herein. It has been discovered that Volumes II-IV consist of the version of the record

C was known for being "loose". In fact, some were referring to her as a "whore," but he thought "loose" sounded better. The judge allowed a number of witnesses to testify that C had a reputation for sleeping around with "this person or that person." They also introduced evidence that she showed up on the flight line with alcohol on her breath.

DISCUSSION

The Court of Military Review held that the actions directed against Lieutenant Gonzalez and Petty Officer Trickel "constituted unlawful command influence," but the court was "convinced beyond a reasonable doubt that the unlawful command influence in this case did not affect either the findings or sentence." 36 MJ at 1186, 1187.

We will now address (A) Command Influence; (B) Interference with Access to Witnesses; and (C) Burdens of Production and Proof in that order.

(A) Command Influence

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authenticated on August 13, 1991, but the March authentication page and the Certificate of Correction for pages 1-1359 both appear in Volume IV. There is no index to the witnesses in Volumes VI-VIII. All of this has created an administrative burden for the Court which should have been avoided by removing entirely the version of the trial in Volumes II-IV because it was not the correct version. The final corrected authenticated version of the trial is in Volumes VI-VIII. That is the only appropriate version for review by the convening authority, the court below, and this Court. The other version should have been destroyed. The exhibits should have been moved to their proper place in the final version. We are at a loss to understand why this situation was not alleviated before the record was transmitted to this Court. We expect closer attention to be paid to such matters.

[1] The initial question is whether the witness interference alleged by appellant constituted "command influence." Article 37(a), UCMJ, 10 USC § 837(a) - Unlawfully influencing action of court - provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

[2] The first sentence indicates, "No authority convening a ... court-martial ... nor any other commanding officer ... may censure, reprimand, or admonish the court of any member ...." It is the second sentence of Article 37(a) that is involved in this case: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial ...." It goes without saying that a violation of Article 37 does not automatically amount to unlawful command influence. Likewise, discrepancy in rank between the party seeking to influence and the person whom he or she seeks to influence is not, in and of itself, the determinative factor in assessing

whether the unlawful interference was indeed unlawful command influence. While the influence may well be unlawful iand its effect just as harmful, there is a distinction between influence that is private in nature and influence that carries with it the mantle of official command authority. The threshold question here is whether, under the facts of this case, appellant's allegations of a violation of this second sentence as to two defense witnesses constitute unlawful command influence or whether the allegations are more accurately styled as unlawful interference with an action of a court.

Our vigilance in combatting unlawful command influence is well recognized. In *Weiss v. United States*, ___ U.S. ___, ___ _ ___, 114 S.Ct. 752, 762-63, 127 L.ED.2d 1 (1994), the Supreme Court asserted:

> The entire system, finally, is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years. That Court has demonstrated its vigilance in checking any attempts to exert improper influence over military judges. In *United States v. Mabe*, 33 MJ 200 (1991), for example, the Court considered whether the Judge Advocate General of the Navy, or his designee, could rate a military judge based on the appropriateness of the judge's sentences at courts-martial. As the Court later described: "We held [in *Mabe*] that the existence of such a power in these military officers was inconsistent with Congress' establishment of the military 'judge' in Article 26 and its exercise violated Article 37 of the Code." [*United States v.*] *Graf*, 35 M.J. [450] at 465 [(CMA 1992)]. And in *Graf*, the Court held that it would also violate Articles 26 and 37 if a

> Judge Advocate General decertified or transferred a military judge based on the General's opinion of the appropriateness of the judge's findings and sentence.

Since the 1950's until the present, we have condemned many instances of unlawful command influence, including unlawful influence of court members: *United States v. Kitts*, 23 MJ 1-5, 108 (CMA 1986) (staff judge advocate briefing court members prior to pending court-martial); *United States v. Zagar*, 5 USCMA 410, 18 CMA 34 (1955) (Court condemned impropriety of lecture by a colonel to court members'; *United States v. Hunter*, 3 USCMA 497, 13 CMA 53 (1953) (convening authority at a pretrial conference discussing prior derelictions of the accused with at least three court members and telling them of light sentences in prior cases); direction to try specific class of defendants by general court-martial; *United States v. Hawthorne*, 7 USCMA 293, 22 CMR 83 (1956) (commanding general directed trial by general court-martial of all Regular Army soldiers with two prior admissible convictions); criticizing adjudged sentences in previous cases: *United States v. Littrice*, 3 USCMA 487, 13 CMR 43 (1953) (acting group commander criticizing sentences); and commanders discouraging witnesses from testifying: *United States v. Dykes*, 38 MJ 270 (CMA 1993); *United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1989). In each of these cases we looked at the interference with the substantial rights of the accused. It was not until *United States v. Thomas, supra*, 22 MJ at 394, that we enunciated the test that the appellate courts must be "persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence."

Each of the unlawful-command-influence cases has involved some mantle of command authority in the alleged unlawful activity. The actors have been convening authorities, commanders, and staff judge advocates. When the officiality of command has been established, we have applied a very stringent standard and burden on the Government.

(B) Interference with Access to Witnesses

[3] The protection of the United States Constitution and Federal laws apply to members of the armed forces "except those [protections] which are expressly or by necessary implication inapplicable," *United States v. Jacoby*, 11 USCMA 428, 430-31, 29 CMR 244, 246-47 (1960). Applicable protections include the fundamental right to a fair trial, *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); and the Sixth Amendment right to compulsory process, and the right to confront and to cross-examine witnesses. *See also* Art. 46, UCMJ, 10 USC § 846.

As chief Judge Sullivan stated in *United States v. Williams*, 37 MJ 352, 359 (CMA 1993): "The Court unequivocally adopted the Supreme Court's holding that, where evidence is relevant, material, and favorable to the defense, such evidence 'is constitutional required to be admitted.'" From the accused's viewpoint these rights are most critical and epitomize the underpinnings of the adversary system. We have been diligent to ensure that nothing underlines the fairness of factfinding process in the military criminal justice system.

[4] Here the defense alleges that one witness and one potential witness were told by individuals in the squadron

not to testify for appellant and against the victim. A parallel may be drawn between this case and the cases from the Supreme Court discussing government interference with the access to witnesses. The standard of review on appeal is whether the defendant can make "a plausible showing" that the testimony of the absent witnesses would have been "material and favorable to his defense" and was not merely cumulative to the testimony of available witnesses. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982).

Valenzuela-Bernal was charged with transporting an illegal alien into the United States in violation of 8 USC § 1324(a)(2). He moved to dismiss the indictment, claiming that the Government had deported two of the passengers in the car he was driving, thus violating his rights to due process and "to compulsory process for obtaining favorable witnesses." 458 U.S. at 861, 102 S.Ct. at 3443. The Supreme Court held there was no violation of the right to compulsory process. "[T]o establish a violation of the right" to compulsory process more must be shown than "the mere absence" of witnesses. *Id.* at 867, 102 S.Ct. at 3446, *citing Washington v. Texas*, 388 U.s. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), where the "Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of 'testimony [that] would have been *relevant* and *material*, and ... *vital* to the defense.' 388 U.S. at 16 [87 S.Ct. at 1921] emphasis added)." The Court in *Valenzuela-bernal* continued, "He [the defendant] must at least make some plausible showing of how their testimony would have been both material and favorable to his defense." 458 U.S. at 867, 102 S.Ct. at 3446.

[5] In *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), "the trial judge, on his own initiative," warned defendant's sole witness, who had an extensive criminal record, that he could "get into real trouble" if he lied and his testimony would be "personally" brought to the attention of the grant jury by the judge. After hearing these remarks, the witness refused to give any testimony. *Id.* at 96, 93 S.Ct. at 352. In *Webb*, the Supreme Court found a violation of the right to a fair trial when the action of the judge affectively drove the witness off the witness stand. *Id.* at 97-98, 93 S.Ct. at 353-354. The attempted interference with witnesses by individuals with no mantle of command authority as described earlier is not command influence but interference with the access to witnesses.

Applying the foregoing discussion of unlawful command influence and interference with access to witnesses to the facts of appellant's case, we note that the mantle of command authority is lacking from the allegation of interference with at least one of the two defense witnesses. Lieutenant Gonzalez described the individuals who talked to him as part of JOPA (Junior Officer Protections Association). He testified that this type of organization is "common" to "all aviation squadrons" and stands for "What Dad doesn't know won't hurt him, and JO's [junior officers] stick together, basically, regardless of the cost." JOPA is neither a command nor an officially sponsored organization.

Indeed, LT Gonzalez' testimony indicates that he knew these officers did not represent the command. As the Government argues, it was common knowledge that JOPA's were "rogue organization[s] with goals directly contrary to good order and discipline." Answer at 7. Thus there is no showing that any of the individuals seeking to

influence the testimony of LT Gonzalez did so with the mantle of command authority. While such an allegation of unlawful interference, if true, would certainly constitute a violation of Article 37(a), it would more properly be styled as unlawful interference with access to witnesses rather than unlawful command influence.

[6] The question with regard to appellant's second witness, Petty Officer Trickel, is admittedly a closer call. Trickel submitted a post-trial affidavit in which he stated that, during appellant's trial, he was "harassed" by Lieutenant Commander (LCDR) Hensel, and aircraft pilot who had flown with the victim, and Warrant Officer Quillian. Petty Officer Trickel also stated that he was told by his division Officer, LT Denz, "not to get involved" with appellant's trial. There is no showing that any of the individuals seeking to influence Petty Officer Trickel did so with the mantle of command authority. Indeed it appears from Trickel's affidavit that LCDR Hensel, the highest ranking individual, was motivated by private rather than command concerns. Yet the disparity in rank and the position of the witness' Division Officer in the chain of command is troubling. Under these circumstances we agree with the court below and conclude that the attempts to discourage Petty Officer Trickel from testifying, especially by his Division Officer, can fairly be construed as unlawful command influence. As a practical matter, a determination of whether the interference with appellant's two witnesses was unlawful command influence or unlawful interference with access to witnesses makes no difference in the resolution of the granted issue.

(C) Burdens of Production and Proof

[7] Whether the allegation is one of unlawful command

influence or unlawful interference with access to a witness, the burden of production is on the party raising the issue.[2] As we indicated in *United States v. Allen*, 33 MJ 209, 212 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1473, 117 L.Ed.2d 617 (1992):

> [T]here must be something more than an appearance of evil to justify action by an appellate court in a particular case. "Proof of [command influence] in the air, so to speak, will not do." We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of command influence in the absence of a connection to the result of a particular trial. *United States v. Thomas*, 22 MJ 388, 396 (CMA 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987), *see also United States v. Levite*, 25 MJ 334, 341 (CMA 1987) (Cox, J., concurring).

We also opined in *United States v. Johnston*, 39 MJ 242, 244 (CMA 1994): "We believe that the threshold triggering further inquiry should be low, but it must be more than a bare allegation or mere speculation." *See also* RCM 905(c)(2)(A), Manual for Courts-Martial, United States, 1984.

[8] As Judge Cox stated in his concurring opinion in *United States v. Levite*, 25 MJ at 341, an appellant must (1) "allege[] sufficient facts which, if true, constitute

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[2] **Normally the burden of production is upon the moving party. RCM 905(c)(2)(A), Manual for Courts-Martial, United States, 1984. An exception to this is when the evidence is within the exclusive control of the Government. This exception does not apply here.**

unlawful command influence"; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness. We adopt this test. The same three-pronged analysis would apply to an allegation of unlawful interference with access to witnesses.

[9] Once an appellant has met the burden of production and proof, the burden then shifts to the Government. As to the burden of proof, RCM 905(c)(1) provides: "Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." As we mentioned earlier, in *Thomas* we created an exception to this burden of proof in cases of unlawful command influence. There we enunciated for the first time the test for a judge and an appellate court is that is must be "persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." 22 MJ at 394. *Cf. United States v. Wright*, 17 USCMA 110, 113, 37 CMR 374, 377 (CMA 1967) ("On this record, we are not convinced that the sentence indicates a degree of leniency demonstrating complete disregard of the influence of the lecture.").

CONCLUSION

[10] Appellant has presented evidence, unrebutted by the Government, that LT Gonzalez and Petty Officer Trickel were unlawfully approached by others in violation of Article 37(a) in an attempt to influence them not to testify on appellant's behalf. In the case of Petty Officer Trickel, this violation amounted to unlawful command influence. Thus appellant has met his burden of production and proof for the first prong of the three-

pronged *Levite* analysis. Regardless of our characterization of the unlawful influence directed at the two defense witnesses, we agree with the Court of Military Review wand are satisfied beyond a reasonable doubt that any unlawful command influence on either of the two witnesses did not affect the findings or sentence.

The first witness who was alleged to have been influenced was LT Gonzalez. He attempted to impeach the victim by testifying as to her reputation for drunkenness, promiscuity, and amnesic episodes. He did not appear to be the least bit intimidated. Gonzalez testified that the victim had a reputation for being promiscuous and an alcoholic. LT Gonzalez was impeached by a prior felony conviction, a false report in applying for his commission, bias against the victim, and being disliked by his fellow officers for being untruthful.

In an affidavit before the Court of Military Review, Petty Officer Trickel asserted that he "was being verbally harassed by Warrant Officer Quillian and Lieutenant Commander Hensel." Hensel testified at trial for the defense that the victim had a reputation for promiscuity and that she appeared on the night line intoxicated. Neither the affidavit nor the record of trial indicates any testimony that was suppressed because of his "harassment" by the two officers or the conversation with his Division Officer.

This is not the type of case where witnesses have been driven from the witness stand as in *Webb*. Appellant has failed to demonstrate what legally and logically relevant evidence was not admitted because of the allegations of interference with these two witnesses. Eleven witnesses testified for the defense concerning appellant's character

for peacefulness and truthfulness. Five witnesses testified that the victim had a reputation for being "promiscuous" and "loose" and had no prior sexual relationship with appellant. One could argue that the reputation evidence introduced as to the victim in this case went far beyond that permitted by Mil.R.Evid. 412, Manual, *supra*. *Cf. United States v. Williams*, 37 MJ 352 (CMA 1993).

Judges COX and GIERKE concur.

WISS, Judge (concurring in part and in the result):

In its effort to fit cases like *United States v. Kitts*, 23 MJ 1-5 (CMA 1986), and *United State v. Zagar*, 5 USCMA 410, 18 CMA 34 (1955), within the first sentence of Article 37(a), Uniform Code of Military Justice, 10 USC § 837(a), which by its literal terms addresses only "commanding officer[s]," the majority opinion explains that all of this Court's "command influence" cases have "involved some mantle of command authority in the alleged unlawful activity." ___ MJ at ___. I have no particular disagreement with the accuracy of that statement or any particular disagreement with its legitimacy.

I do in part company with the majority, however, with its implication that the "mantle of command authority" is limited to the formal structure of some particular command. The very essence of military relationships is that the orders of *superior commissioned officers, warrant officers, noncommissioned officers, and petty officers*--not just superior commanders--will be obeyed (in the absence of the illegality). *See, e.g.*, Arts. 90(2) and 91(2), UCMJ, 10 USC §§ 809(2) and 891(2), respectively. In this light, I would apply this Court's "very stringent standard and burden on the Government" (___ MJ at ___) which we set

out in *United States v. Thomas*, 22 MJ 388 (1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987), to any instance of unlawful influence by a superior commissioned, warrant, noncommissioned, or petty officer.

The complained-of influence of Lieutenant Gonzalez does not meet that situation; the pressure on him was peer pressure, brought to bear by fellow junior officers. Thus I concur with the majority's treatment of the issue as it relates to Gonzalez.

The alleged influence on Petty Officer Trickel, however, is an animal of a different color. Trickel testified that he had been pressured by superior commissioned officers--indeed, one of them was his Division Officer (though not literally a commander). Accordingly, I would apply the *Thomas* standard and burden to this allegation of command influence. Doing so, however, I am satisfied beyond a reasonable doubt that the unlawful influence on Petty Officer Trickel by his superior officers did not prejudice either the findings or the sentence in appellant's court-martial.

As a final note, I expressly condemn in the strongest possible terms the thuggery of the "Junior Officer Protection Association" in this case. Junior officers are protected by the *law*; they neither need nor are entitled to "protection" that is accomplished by *violation* of the law. *See* Art. 37(a) of the Code (second sentence: para. 96, Part IV, Manual for Courts-Martial, United States, 1984 (obstruction of justice prohibited by Article 134, UCMJ, 10 USC § 934).

SULLIVAN, Chief Judge (concurring in the result):

Article 37, Uniform Code of Military Justice, 10 USC § 837, is the touchstone of American Military Law, I reject its dissection by the majority opinion and the suggestion that the prejudice standard of *United States v. Thomas*, 22 MJ 388 (CMA 1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987), is inapplicable to situations where courts-martial are unlawfully influenced by persons other than commaners. Moreover, I fail to see how this distinction assists this Court in vigilantly ensuring the integrity of military justice, *see Weiss v. United States*, ___ U.S. ___ _ ___, 114 S.Ct. 752, 762-63, 127 L.Ed.2d 1 (1994), or otherwise promotes resolution of this case. Wavering in this matter conflicts with nearly a half century of tradition and practice at this Court.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

DAVID C. LARSON R.A. STRICKLAND
JAMES E. ORR

UNITED STATES

V.

Robert T. STOMBAUGH, 570 77 3911
Aviation Machinist's Mate Airman Apprentice,
U.S. Naval Reserve

PUBLISH

NMCM 92 0181 Decided 19 March 1993

Sentence adjudged 20 December 1990. Military Judge: Peter J. McLaughlin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Support Activity, FPO New York 09521-1000.

LT JAMES A. DOUGLAS, JAGC, USNR, Appellate Defense Counsel
LT DAVID K. HERLIHY, JAGC, USNR, Appellate Government Counsel

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel
CHUCK R. PARDUE, Esquire, Civilian Defense Counsel

STRICKLAND, Senior Judge:

The appellant was convicted by general court-martial, comprised of officer and enlisted members, of rape, burglary, unlawful entry, and indecent assault in violation of Articles 120, 129, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 929, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 93 months, forfeiture of $680.00 pay per month for 90 months, and reduction to pay grade E-1. In response to clemency requests submitted on behalf of the appellant, the convening authority approved the adjudged sentence but suspended confinement and forfeitures in excess of 72 months.

Six assignments of error are raised on appeal.[1] We

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[1] I. WHETHER APPELLANT WAS PROPERLY CONVICTED EVEN THOUGH THERE WAS INSUFFICIENT EVIDENCE, APPLYING A BEYOND A REASONABLE DOUBT STANDARD, WITH WHICH TO FIND HIM GUILTY.

II. WHETHER FORCING PETITIONER TO LANGUISH IN CONFINEMENT, WITHOUT HOPE OR MEANS TO INITIATE APPELLATE RELIEF PROCEDURES, FOR MORE THAN FOUR HUNDRED FIFTY DAYS WHILE THE GOVERNMENT DELAYED PRODUCING THE REQUESTED PERFECTED RECORD OF TRIAL UNFAIRLY PREJUDICED APPELLANT.

III. WHETHER ILLEGAL COMMAND INFLUENCE UNFAIRLY PREJUDICED APPELLANT'S TRIAL AND DEPRIVED APPELLANT OF A FAIR TRIAL.

have carefully considered each assignment of error and have reviewed the record pursuant to Article 66, UCMJ, 10 U.S.C. § 866. We conclude that the assignments of error have no merit and that no prejudicial error was committed which affects the findings or sentence.

IV. WHETHER A STATEMENT CREATED BY NAVAL INVESTIGATIVE SERVICE AGENTS WITH THE COOPERATION OF APPELLANT, LATER LABELLED "CONFESSION" BY THE GOVERNMENT, WAS IN FACT A VALID STATEMENT BY APPELLANT BECAUSE SUCH STATEMENT WAS OBTAINED AFTER DENIAL OF APPELLANT'S REQUEST FOR COUNSEL, AND WHETHER SUCH A QUESTIONABLE STATEMENT WAS ERRONEOUSLY ADMITTED INTO EVIDENCE.

V. WHETHER HARMFUL PREJUDICE ACCRUED TO APPELLANT WHEN THE TRIAL COURT DECLARED THAT A CLINICAL PSYCHOLOGIST WITH NO SPECIALIZED TRAINING IN MATTERS OF A SEXUAL NATURE, WHO WAS THE PROSECUTION'S MAIN SOURCE OF INFORMATION AND WHO CONDUCTED THE 706 BOARD AGAINST APPELLANT, CAN BE CONSIDERED AN ADEQUATE SUBSTITUTE EXPERT WITNESS FOR APPELLANT'S EXPERT OF CHOICE WHO HAD EXTENSIVE TRAINING IN SEX THERAPY, POST TRAUMATIC STRESS DISORDER, SLEEPING-RELATED ACTIVITY, THE EFFECTS OF ALCOHOL ON MEMORY AND RESPONSES, AND DEALING WITH VICTIMS OF SEXUAL ABUSE.

VI. WHETHER A SENTENCE THAT INCLUDES A DISHONORABLE DISCHARGE, UNSUSPENDED CONFINEMENT FOR SEVENTH-TWO [sic] (72) MONTHS, REDUCTION IN RATE TO E-1, AND FORFEITURE OF $680.00 PER MONTH IN INAPPROPRIATELY SEVERE UNDER THE FACTS OF THIS CASE.

I

At approximately 0400 hours on 2 September 1990, a dependent wife, W, and a female Lieutenant Junior Grade, C, were asleep in C's room at the Bachelor Officer Quarters (BOQ).[2] W was awakened by the closing of the front door and a male who lay down beside her with his face on her breasts. In response to W's inquiry as to who he was, the male replied that he was a new pilot in C's squadron and that C told him he could "crash" there. After a short discussion, during which W became initially convinced that the male was a pilot, W felt the male's hand moving toward her groin area and she got up, got dressed, and left the room. Thereafter, the male left the room and later returned and entered the bedroom where C slept. C testified that she was awakened by a male on top of her with his penis penetrating her vagina. She recognized this male as the appellant, an enlisted man in her squadron. C stated that she pushed the appellant away and told him to leave. the appellant complied.

The appellant asserted at trial and again on appeal that C had consented to the intercourse or, in the alternative, that he was honestly and reasonably mistaken in believing that she had consented. He testified that some 6 months previously, C had invited him to come to her room sometime and "party" and, having been locked out of his room at 0400, he decided to take her up on the invitation. He denied representing himself to W as an officer, placing his face on her breasts, or reaching for her groin area. The

---

[2] The room was actually a suite of two rooms with a living room in the front portion of the suite, just inside the front door, and a bedroom and bath in the rear of the suite, separated from the living room by a door.

appellant further testified that when he entered C's bedroom she was lying naked on the bed and that she touched his wrist and then his shirt and belt. After removing his clothes and getting in bed with C, the appellant said that she assisted him in inserting his penis and reinserted his penis into her vagina when it slipped out. He further stated that she wrapped her legs around him and moved her body back and forth. However, the appellant testified that at some point he decided he did not want to do this and stopped, at which time C commented that this cold ruin her career and he had better leave before they were seen together.

In support of this defense, numerous character witnesses were called to testify as to the appellant's character for peacefulness and for being truthful, while C was portrayed as having a reputation for drinking to intoxication and for being promiscuous. One of the character witnesses, Lieutenant Gonzalez, testified that he was told by fellow junior officers in the squadron that he should not testify for the appellant and against the victim. Another character witness, a petty officer, asserts in an affidavit that his division officer told him not to get involved and that he was verbally harassed by two other officers when they learned he was going to testify for the appellant.

II

The appellant asserts that the Government delay in forwarding the record of trial for review has resulted in unfair prejudice and that the charges should therefore be dismissed. The standard of review on appeal is whether the appellant has met his burden to demonstrate that he was actually prejudiced by this delay. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

The appellant was sentenced on 20 December 1990. The record of trial was thereafter transcribed in a timely fashion and was authenticated by the military judge on 8 March 1991. Trial defense counsel, however, found what he believed were major deficiencies in the transcription and moved for a certificate of correction on 8 April 1991. The convening authority agreed, and the entire record was transcribed again resulting in a "corrected" copy. The "corrected" copy was authenticated by the military judge on 13 August 1991, and the convening authority took action on 27 December 1991. The case was received by the Navy-Marine Corps Appellate Review Activity on 24 January 1992.

In support of this assignment of error, the appellant asserts that he was prejudiced by being unable to timely present defense submissions to the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 1105, that he was unable to qualify for parole consideration, and that he was unable to initiate an appeal under Articles 66 and 67, UCMJ. The Government submitted an affidavit explaining the reasons for post-trial delay in this case and takes the position that no specific prejudice has occurred.

In *Banks*, the Court of Military Appeals overturned the inflexible rule established in *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974), that charges would be dismissed in any case where the accused was confined and the convening authority did not take action in the case within 90 days. In its place, the Court instituted the test that the "delay of final action by the convening authority will be tested for prejudice." *Banks* at 94. This test was reiterated in *United States v. Clevidence*, 14 M.J. 17 (C.M.A. 1982), with the added caveat that the Court would be reluctant to dismiss charges as a remedy in

a case involving serious offenses. The prejudice must be verified or verifiable, and the burden to demonstrate prejudice rests with the appellant. *United States v. Dunbar*, 31 M.J. 70 (C.M.A. 1990).

In this case, the appellant first claims that he was unable to timely submit R.C.M. 1105 matters to the convening authority who had the power to grant him relief. the fact of the matter is, the appellant ultimately did submit R.C.M. 1105 material, and the convening authority granted him sentence relief by suspending 21 months of the appellant's sentence to confinement. The fact that the convening authority might have been able to suspend this confinement sooner would not have benefited the appellant in any way since the approved period of unsuspended confinement was 72 months.

Secondly, the appellant claims that he was unable to qualify for consideration for parole because the Government violated its own regulations by failing to forward a copy of the record of trial and the convening authority's action to the Naval Clemency and Parole Board within 9 months after the sentence began to run. thus, he argues the board was unable to timely consider his case when he was an excellent candidate for clemency. The Government has filed evidence in the record that the Naval Clemency and Parole Board considered the appellant's case on 9 April 1992, and the board decided against granting clemency. We have no problem concluding that if the board failed to grant clemency for the appellant after he was incarcerated for nearly 16 months, they would not have done so any sooner, at a time when even less confinement had been served.

Finally, the appellant contends that he was precluded

from being able to initiate his appeal in this Court as well as the Court of Military Appeals. Had we found merit in his appeal resulting in either a dismissal of the findings and sentence or the affirmance of the sentence less than time already served, the appellant might be able to demonstrate prejudice. Since we find no merit in his appeal, the appellant has filed to so demonstrate. Should he later be able to convince the Court of Military Appeals that prejudice has occurred, we are confident that an appropriate remedy will be fashioned at that time.

We conclude that the appellant has failed to meet his burden to verify the existence of actual prejudice in the case occasioned by the lengthy delay in executing the convening authority's action. In so holding, we in no way condone this excessive delay. Although some of the delay appears to be justified, the overall delay is not.

III

The appellant contends that unlawful command influence, both apparent and actual, was exercised in his case depriving him of a fair trial. The standard of review on appeal is a three-part test. First, did the defense, at trial or on appeal, present some evidence from which to draw a reasonable conclusion in favor of the allegation of command influence? Second, if the issue of command influence is reasonably raised, did the Government meet its burden to prove by clear and positive evidence that command influence did not occur? Third, if the Government failed to meet its burden, and there is a finding that command influence existed, can this Court be satisfied that the findings and sentence are unaffected by the command influence beyond a reasonable doubt? *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R.

1990).

Although the defense never formally sought a remedy at trial based on unlawful command influence, some evidence on this issue was received at trial, and some evidence has been accepted on appeal. During the defense case in chief on the merits, Lieutenant Gonzalez was called as a witness. Lieutenant gonzalez was the appellant's Branch Officer, and he testified that the appellant was hard-working and diligent; had a reputation for being honest to a fault; and had a reputation as being nonaggressive. He further testified that the victim, C, had a reputation for being promiscuous and for being a drinker. He also indicated that he was personally aware of one instance where C appeared to have had an alcoholic blackout as to events occurring the previous evening. The lieutenant's credibility was severely attacked by the trial counsel on cross-examination with reference to two convictions before entering the naval service and some alleged deficiencies in flight performance. Thus, in redirect, the defense counsel attempted to counter this credibility attack by demonstrating that the lieutenant was testifying despite pressure from his peers to keep quiet and despite animosity from his peers due to his involvement in the appellant's court-martial. The following colloquy occurred:

> Q. How many people have given you some flack concerning testifying with respect to this court-martial?
> A. A large amount of people, sir.
>
> Q. And, is that officers?
> A. Yes, sir.
>
> Q. You've been criticized about testifying?

A. Yes, sir, I have.

Q. You've felt some pressure from these officers?
A. Yes, sir. There's something called JOPA, and I'm not playing by the rules of JOPA.

Q. Could you explain what JOPA is?

. . . .

A. JOPA is the junior Officer Protection Association. That's common in all aviation squadrons. Basically, it's "What Dad doesn't know, won't hurt him, and JO's stick together, basically, regardless of the cost." When this incident started, the Commanding Officer said to me, "You are Airman Stombaugh's Branch Officer. You are responsible for his well-being throughout these proceedings." I said, "Yes, sir," and I started doing that. . . .

. . . .

Q. Is there anything else that you want to answer concerning JOPA or dislike in the Squadron?

A. Yes, sir. Within the Squadron members, since I started doing what I've been told to do, to look out for Airman Stombaugh and make sure he was getting his checks, that he access [sic] to his personal property,

> etcetera, a couple of the officers in the wardroom started asking me what my involvement was. I told them, "I'm his Branch Officer, I'm supposed to look out for him. I'm doing my job." When it became known that I had talked to Captain Lizzul, and I was going to testify, a couple people reminded me that JOPA existed, and that C . . . was an officer, and that Stombaugh was an enlisted man. I really didn't the hint [sic]. I just kind of went, "Yeah, right whatever. Whoever you are, doesn't change what happened." Before the Article 32 hearing occurred, in fact, the morning I was called into it, a couple of the officers cornered me in the locker room. . . .[3]

Record at 1083-1085.

Examination contained by the military judge and the following colloquy ensued:

> Q. Being as specific as you can, why are the Squadron officers giving you a hard time about testifying at this court-martial?
> A. Well sir, from what was said to me, it was that, as junior officers, it was none of our business as to what had occurred, and that no one would ever really know what occurred in that room that night, and that, therefore, I should basically shut up and tow the line, is the way I interpreted what I was

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[3] **Captain Lizzul was the appellant's detailed defense counsel at trial.**

> told; and that was basically it. And, I've been told more than once, by more than one individual, that, "You're pissing us off," and, "We think you're out to get Spike," or that, "Either advertently, or inadvertently, your testimony is hurting Spike. Whether or not it has anything to do with the case, it's physically hurting her."[4]

Record at 1101.

In addition to the foregoing evidence received at trial, this Court accepted a post-trial affidavit from John Brian Trickel, a petty officer who had favorably testified at trial as to the appellant's character for truthfulness and who testified adversely as to the reputation of C. In this affidavit, Petty Officer Trickel states that when the trial began he informed his Division Officer, Lieutenant Denz, that he was going to testify, and his Division Officer told him not to get involved. He further states that during the trial he was verbally harassed by Warrant Officer Quillian and Lieutenant Commander Hensel. Finally, he states that he asked that the courtroom be cleared prior to his testimony because one of the squadron officers he flew with was present, and he feared that the substance of his testimony would be repeated within the squadron resulting in further harassment.[5]

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[4] Spike was a nickname for the victim, C.

[5] We not that neither the original record or the "corrected copy" reflect that any spectators were removed from the proceeding or that the judge ordered a closed session. This is a significant event in what otherwise is required to be a public trial, *see* Rule for Courts-Martial 806, and this event should be reflected in the record of trial.

The Government has offered no counter-affidavits to rebut the testimony of Lieutenant Gonzalez or the affidavit of Petty Officer Trickel. Instead, the Government takes the position that this evidence could not constitute command influence because command influence involves action by commanders, action taken at their behest, or action in furtherance of command goals and policies. JOPA, the Government reasons, was simply a rouge organization, and the actions of this organization and the officers who dealt with Petty Officer Trickel were not sanctioned by the command. We do not agree with this position, and it is contrary to the law.

The question of whether personnel other that the convening authority can engage in unlawful command influence was answered in *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987) (officer and enlisted members of the command attempting to influence or prevent testimony favorable to the accused). The Court stated, "The plain language of Article 37, its legislative history, and our previous decisions applying it have included such persons within its purview." *Levite*, 25 M.J. at 338, 339. (footnotes omitted). consequently, the Court held that the actions of command personnel constituted unlawful command influence in violation of Article 37, UCMJ. *Accord United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (Article 37 applies to command subordinates and thus to the actions of the division deputy adjutant general in nominating members for court-martial who were supporters of hard discipline).

In this case numerous command subordinates, even a Division Officer within the chain of command, participated in the intimidation and harassment of both Lieutenant

gonzalez and Petty Officer Trickel.[6] We conclude that these actions were undertaken with the clear intent of preventing these witnesses from testifying in a manner favorable to the appellant and adverse to the victim, C. As a result, we further conclude that the issue of command influence has been reasonably raised by the defense, both at the trial level and on appeal. The Government has failed to meet its burden to rebut the evidence of command influence by clear and positive evidence. Accordingly, we hold that the actions of the officers of appellant's command directed toward Lieutenant Gonzalez and Petty Officer Trickel constituted unlawful command influence.

The only remaining question is whether this unlawful command influence affected the findings or sentence. We note that there is no evidence in the record that even suggests that any command influence existed with respect to any other aspect of this case except as it relates to the testimony of Lieutenant Gonzales and Petty Officer Trickel. These two witnesses only testified on the merits; not during the sentencing phase of the trial. Thus, we must only assess the impact, if any, of the unlawful influence on the findings.

Both of the witnesses testified fully for the appellant despite the unlawful command influence exerted upon them. It is clear from Lieutenant Gonzalez's testimony that he had intended all along to testify, and that he as much as told this to his tormentors. He considered it his duty to do so, and he simply felt this was part of taking

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[6] **The irony of this situation is that the appellant's commanding officer was motivated to protect the interests of the appellant from the outset, and the actions of his subordinate officers appears to be completely contrary to the commanding officer's desires.**

care of the appellant as he was ordered to do by his commanding officer. Both of these witnesses testified at the Article 32 proceeding, and their trial testimony is consistent with that given at the Article 32, even though much of the intimidation and harassment occurred between the time of the Article 32 and the time of the trial. In addition, their testimony was consistent with all other defense witnesses who testified as to the character of the appellant and that of the victim. Finally, their testimony was very beneficial to the appellant's position that the allegations were out of character and that he was a truthful person. Their testimony as to certain character flaws in C and her contact with enlisted personnel also benefited the appellant by advancing his position that the allegations were out of character and that he was a truthful person. Thus, we are not faced with a situation where potential witnesses were deterred by command influence from expressing their candid opinions, *see United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990), or a situation where the witness' trial testimony appeared to be less favorable than it had been earlier on the case prior to the existence of the command influence. *See United States v. Hall*, ___ M.J. ___, No. 92-0502 (N.M.C.M.R. 26 February 1993).

We have carefully considered the entire record and, in particular, the testimony of Lieutenant Gonzalez and Petty Officer Trickel and have concluded that their testimony would not have been any different, even in the absence of unlawful command influence. Having so concluded, we are convinced beyond a reasonable doubt that the unlawful command influence in this case did not affect either the findings or the sentence.

IV

The appellant alleges that the military judge erred in finding Dr. Bory to be an adequate substitute expert witness for Dr. Golden, the defense requested expert of choice. The appellant argues that Dr. Bory was not as qualified as Dr. Golden and that he was also anticipated as a government witness. The latter argument was effectively mooted by the military judge's ruling that Dr. Bory could not be a prosecution witness and, at the same time, be an adequate substitute for Dr. Golden. The Government did not call Dr. Bory, and the appellant's argument on this point is without merit.

As to the allegation that Dr. Golden was more qualified to testify than Dr. Bory, this Court has held that an "adequate substitute" for an expert is a witness possessing similar qualifications and who is willing to testify to the same opinions and conclusions. *United States v. Robinson*, 24 M.J. 649, 652 (N.M.C.M.R. 1987). Dr. golden is a clinical social worker with a Masters Degree in Social Work with extensive experience as a sexual therapist. the defense proffered that she would testify concerning human sexual response during sleep and during alcohol induced sleep. The defense believed that her testimony would support the alternate theory that if there was not actual consent in this case, the appellant made an honest and reasonable mistake that the victim consented due to various actions on her part while asleep. Dr. Bory is a clinical psychologist and a Navy Lieutenant Commander who was stationed at the Branch Navy Medical Hospital in Sigonella as the head of the mental health department. While not practicing or studying in the area of sexual response during sleep, Dr. Bory had read extensively in this area. The military judge, without Government objection,

qualified Dr. Bory as an expert witness in psychology generally, and in the area of sleep and sexual response during sleep. In addition, he was qualified by the military judge as an expert in the area of alcohol and its relation to sleep. Record at 1133, 1134.

The apparent difference in qualifications between Dr. Golden and Dr. Bory relate to the actual research and practice in the area of human sexual response on the part of Dr. Golden as opposed to extensive study in this area on the part of Dr. Bory. First, it is important to note that the expert was not called upon to examine or treat any individual involved in this case. The expert was only needed to render opinions based on hypothetical questions posed by the parties. Second, and equally important, is the fact that developing opinion evidence in this area did not involve a "battle of experts," pitting the Government expert against the expert for the defense. In this instance, the military judge qualified Dr. Bory as an expert and his expertise was not challenged. Consequently, we conclude that under the circumstances of this case, the substitute expert possessed similar professional qualifications as the requested expert.

The remaining issue is whether Dr. Bory testified to the same opinions and conclusions as Dr. Golden was willing to testify to according to the proffer. We have carefully considered the proffer of the expected testimony of Dr. Golden and the trial testimony of Dr. Bory, and we have concluded the opinions and conclusions expressed at trial were virtually identical to those contained in Dr. Golden's proffer. Accordingly, we conclude that Dr. Bory was an adequate substitute for Dr. Golden, and we hold that the military judge did not err in reaching the same conclusion.

V

We have carefully considered the remaining assignments of error and find them to be without merit. Although this was a sharply contested case, we find the evidence of appellant's guilt to be overwhelming, and we are specifically convinced beyond a reasonable doubt of the appellant's guilt of the offenses of which he was convicted. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In addition, under all of the facts and circumstances of this case, we conclude that the sentence, as adjudged and partially suspended by the convening authority, is appropriate. Accordingly, the findings and sentence, as approved on review below, are affirmed.

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